Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

A.M. CAPEN'S CO., INC.,

Petitioner,

vs.

AMERICAN TRADING AND PRODUCTION CORPORATION, BLAS ROSSY-ASENCIO AND RAFAELA FULANA DE TAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Both the District Court for the District of Puerto Rico and a panel of the First Circuit in 1996, determined that Puerto Rico's Act 75 of 1964, as amended, known as the Dealer's Act, was applicable to A.M. Capen's contractual relationship with the defendant ATAPCO even though A.M. Capen's is not a resident of the Commonwealth. However, a second panel of the First Circuit in 2000 decided that Act 75's intent is to protect only resident (Puerto Rican) merchants and, therefore, A.M. Capen's could not claim protection of Act 75.

I. Whether the second panel was correct in its determination that a conflict of laws analysis was not applicable to the instant case.

II. Whether, after deciding that a conflict of laws analysis was not appropriate, the second panel should have certified the question of the extent of coverage of Act 75 to the Puerto Rico Supreme Court.

III. Whether Act 75 covers non-resident dealers who otherwise meet most of the criteria required by statute and case law.

LIST PURSUANT TO RULE 14(1)(b) AND RULE 29.6

The following are all the parties to this proceeding:

1. The petitioner A.M. Capen's Co., Inc. ("A.M. Capen's")
2. American Trading and Production Corporation ("ATAPCO").
3. Blas Rossy-Asencio and Rafaela Fulana de Tal, and their Conjugal Partnership.

A.M. Capen's Co., Inc. has no parent, subsidiary or affiliate companies, and it has not issued any shares to the public.

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PETITION FOR WRIT OF CERTIORARI

A.M. Capen's Co., Inc. ("Capen's") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on February 8, 2000, in order to exercise this Court's supervisory powers since the Court of Appeals has departed from the accepted and usual course of judicial proceedings. A rehearing en banc was denied on March 14, 2000 by the Court of Appeals for the First Circuit.

OPINIONS BELOW

The Opinion by the second panel of the Court of Appeals for the First Circuit that gives rise to this petition is set forth in the Appendix at App. 1. The Opinion by the first panel of the Court of Appeals for the First Circuit is reported at 74 F.3d 317 (1st Cir. 1996) and is set forth in the Appendix at App. 15. The Opinion and Order of the Distric Court for the District of Puerto Rico is reported at 12 F.Supp.2d 222 (D.P.R. 1998).

JURISDICTION OF THIS COURT

The Opinion and Order of the District Court for the District of Puerto Rico was entered on March 31, 1998, as Amended Judgment was filed and entered on May 13, 1998. An Opinion and Order On Reconsideration was filed on September 15, 1998. The respondent, ATAPCO, filed a Notice of Appeal on October 2, 1998 A.M. Capen's

filed its Cross-Appeal on October 13, 1998. The judgment of the Court of Appeals for the First Circuit was entered on February 8, 2000. A timely filed petition for rehearing and suggestion for rehearing en banc was denied on March 16, 2000. Pursuant to Supreme Court Rules 13.1 and 13.3, this petition has been filed within 90 days of the denial of rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, § 8, clause 3 states that the Congress shall have power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

28 U.S.C. § 1332(a)(1) provides in pertinent part that:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –
>
> (1) citizens of different States;

28 U.S.C. § 1652 provides that:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

New Jersey Permanent Statutes, 56: 10-4 (Application of act) provides:

> This act applies only:
>
> a. to a franchise (1) the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey, (2) where gross sales of products or services between the franchisor and franchisee covered by such franchise shall have exceeded $35,000.00 for the 12 months next preceding the institution of suit pursuant to this act, and (3) where more than 20% of the franchisee's gross sales are intended to be or are derived from such franchise; or
>
> b. to a franchise for the sale of new motor vehicles as defined in R.S. 39:10-2, the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the state of New Jersey.

New Jersey Permanent Statutes, 56: 10-3f (Definitions – Place of business) provides, in pertinent part, that:

> As used in this act:
>
> a. "Franchise" means a written arrangement for a definite or indefinite period, in which a person grants another a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise.
>
> * * *
>
> f. "Place of business" means a fixed geographical location at which the franchisee displays for

> sale and sells the franchisor's goods or offers for sale and sells the franchisor's services. Place of business shall not mean an office, a warehouse, a place of storage, a residence or a vehicle.

Missouri Revised Statutes, 407.400(1) (Definitions – Franchise) states:

> (1) "Franchise" means a written or oral arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trademark, service mark, or related characteristic, and in which there is a community of interest in the marketing of goods or sevices at wholesale, retail, by lease, agreement, or otherwise, including but not limited to a commercial relationship of definite duration or continuing indefinite duration between a "wholesaler", such wholesaler being a person as defined in this section, licensed pursuant to the provisions of chapter 311, RSMo, to sell at wholesale, intoxicating liquor, as defined in § 311.020, RSMo, to retailers, duly licensed in this state, and a "supplier", being a person engaged in the business as a manufacturer, distiller, rectifier or out-of-state solicitor whose brands of intoxicating liquor are distributed through duly licensed wholesalers in this state, and wherein a wholesaler is granted the right to offer, sell, and distribute within this state or any designated area thereof such of the supplier's brands of intoxicating liquor, or all of them, as may be specified; except that, the term "franchise" shall not apply to persons engaged in sales from warehouses or like places of storage, other than wholesalers as above described, leased department of retail stores, places of

> original manufacture, nor shall the term 'franchise' apply to a commercial relationship that does not contemplate the establishment or maintenance of a place of business within the state of Missouri. As used herein "place of business" means a fixed, geographical location at which goods, products or services are displayed or demonstrated for sale;

Puerto Rico Dealer's Act, P.R. Laws Annotated, 10 L.P.R.A. § 278, provides, in pertinent part, that:

> (a) Dealer: person actually interested in a dealer's contract because of his having effectively in his charge in Puerto Rico the distribution, agency, concession or representation of a given merchandise or service;
>
> (b) Dealer's contract: relationship established between a dealer and a principal or grantor whereby and irrespectively of the manner in which the parties may call, characterize or execute such relationship, the former actually and effectively takes charge of the distribution of a merchandise, or of the rendering of a service, by concession or franchise, on the market of Puerto Rico.

Art. 14, Puerto Rico Civil Code, P.R. Laws Annotated, 31 L.P.R.A. § 14 provides:

> When a law is clear and free from all ambiguity, the letter of the same shall not be disregarded, under the pretext of fulfilling the spirit thereof.

Puerto Rico Rules of Civil Procedure, P.R. Laws Annotated, 32 L.P.R.A. App. III R. 53.1(f) provides:

> A petition for certification is also perfected when the United States Supreme Court, any

United States Circuit Court of Appeals, any Federal District Court or the State Court of any State of the Union requests, by filing the proper application with the clerk of the Supreme Court of Puerto Rico, a finding on local issues of law which are determinant to the cause of action brought before its consideration, which issues have no clear precedents in the decisions of the Supreme Court of the Commonwealth of Puerto Rico.

STATEMENT OF THE CASE

1. Introduction

The United States District Court for the District of Puerto Rico had subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1): diversity.

2. Material Facts

The facts material to consideration of the questions presented are as follows:

As pled and addressed during the course of proceedings: A.M. Capen's is a corporation duly organized and existing under of the laws of New Jersey, with its principal place of business in New Jersey. A.M. Capen's does not sell in New Jersey but in Puerto Rico and other overseas markets.

American Trading and Production Corporation ("ATAPCO") is a corporation duly organized and existing under the laws of Maryland, with its principal place of business in Missouri. Blas Rossy-Asencio and his wife

Rafaela Fulana de Tal ("Rossy") are citizens and residents of the Commonwealth of Puerto Rico.

In 1978 A.M. Capen's entered into an agreement with ATAPCO's predecessor, Sheller-Globe, to be the exclusive distributor of Globe-Weiss and Steelmaster office products in Puerto Rico, the Caribbean, the Dominican Republic, and Central and South America. The agreement did not contain an expiration date. Although confirmed in a written letter, the parties did not sign a formal contract because they could not agree on several factors that would apply to a new contract. When ATAPCO took over, the arrangement with A.M. Capen's continued with no changes on the original exclusive distributor agreement for Puerto Rico.

ATAPCO, with its principal place of business in Missouri, wanted Missouri law to apply to the contract. A.M. Capen's, a New Jersey corporation with its principal place of business in that state, wanted Puerto Rico law to apply. Consequently, the letter agreements remained in effect without changes.

A.M. Capen's was not required to advertise in Puerto Rico or have a warehouse or a showroom on the island, nor were these needed to sell within Puerto Rico. It sold and continues to sell exclusively to retailers and wholesalers in Puerto Rico. Though A.M. Capen's frequently sends salespersons to Puerto Rico, it is not required to have a resident agent on the island and is not required to be qualified to do business in Puerto Rico on a regular basis. Annual sales of ATAPCO products under A.M. Capen's exclusive distributorship increased significantly from 1978 to 1993.

In December 1993, ATAPCO wrote a letter to A.M. Capen's in which it terminated the exclusivity of the dealership. ATAPCO did not end the A.M. Capen's dealership; it reserved the right to sell to others. ATAPCO unilaterally made Blas Rossy-Asencio a sales representative for the area for which A.M. Capen's originally had the exclusive rights.

3. The earlier litigation and first panel opinion

A.M. Capen's filed an action in the U.S. District Court for the District of Puerto Rico alleging that ATAPCO violated P.R. Laws Annotated, 10 L.P.R.A § 278, *et seq.* (a.k.a. Act 75, the Puerto Rico Dealer's Act) by terminating the exclusivity of the distributorship, and seeking damages, costs and attorney's fees.

The District Court adopted the recommendation of the Magistrate Judge that the provisional remedy in the Puerto Rico Dealer's Act be granted and issued an opinion. ATAPCO appealed from the preliminary injunction. The First Circuit Court of Appeals reviewed the preliminary injunction under the standard of abuse of discretion. The Court of Appeals stated that the defendant's appeal was posited on two contentions: that Puerto Rico law does not apply; and that plaintiff is not a dealer under the Puerto Rico Dealer's statute. App. 19.

The First Circuit analyzed these questions primarily from the viewpoint of conflict of laws. It was pointed out that Puerto Rico had adopted the dominant or significant contacts test for contract and torts actions, and that recourse to the Restatement (Second) of Conflict of Laws

was appropriate. Accordingly, performance of the contract was one of the contacts to be taken into consideration and in this particular case, performance never occurred in the continental United States, but in Puerto Rico. Another factor, the subject matter of the contract (the exclusive distributorship), took place in Puerto Rico. As to torts, the site of the injury was Puerto Rico and, therefore, the Commonwealth had an interest in applying its laws. App. 23, 24.

The Court of Appeals stated plainly "As the district court pointed out, there is nothing in the statute that requires a dealer to be a resident of Puerto Rico, to be authorized to do business in the Commonwealth, or to do business in the Commonwealth, or to have a place of business such as an office, showroom or warehouse on the Island," App. 25, 26 and that accordingly, A.M. Capen's appears to satisfy the definition of a dealer within the Dealer's Act.

The court finished by stating that neither New Jersey nor Missouri statutes can protect A.M. Capen's, but since they do protect distributors they would not be offended by applying the Puerto Rico Dealer's Act in this case since A.M. Capen's market is in Puerto Rico. App. 27.

4. Second panel decision and the instant litigation

After the granting of the preliminary injunction was affirmed, *A.M. Capen's v. American Trading & Prod. Corp.*, 74 F.3d 317 (1st Cir. 1996), App. 15-20, the parties cross-moved for summary judgment. The district court granted

A.M. Capen's motion for partial summary judgment on liability, *A.M. Capen's v. American Trading & Prod. Corp.*, 973 F.Supp. 247 (D.P.R. 1997). Following a bench trial as to damages, judgment was awarded to A.M. Capen's, *A.M. Capen's v. American Trading & Prod. Corp.*, 12 F.Supp.2d 222 (D.P.R. 1998). ATAPCO filed a notice of appeal from an amended judgment and A.M. Capen's filed a cross-appeal in disagreement with the sum awarded.

On February 8, 2000, a second panel of the First Circuit Court of Appeals brushed off the issue of conflict of laws stating that " . . . the only matter before the Court is the applicability of Act 75," App. 6 and then holding that " . . . under the facts of this case, appellee fails to qualify for the remedies of the statute because it did not operate as a 'dealer' in Puerto Rico." App. 3. The reasons given were that the legislative history " . . . confirms an interpretation of 'in Puerto Rico' that incorporates requirements that Act 75 dealer be located in, be a resident of, or be authorized to do business in Puerto Rico." App. 10.

The issue of conflict of laws is explained away by the Court of Appeals (second panel) in a footnote, "Since we hold that Act 75 does not apply, and Puerto Rico law on this issue is identical to Missouri and New Jersey law – the other forums that might have an interest – there is no conflict of law. *See Steinke v. Sungard Fin. Sys., Inc.*, 121 F.3d 763, 775 (1st Cir. 1997) ('We need not resolve [the choice of law] issue, however, [if] "the outcome is the same under the substantive law of either jurisdiction." ' " App. 6, 7.

However, the laws are not identical; therefore, if A.M. Capen's could obtain protection under Puerto Rican law, (a plain reading of Act 75 shows that there is no residency requirement to qualify as a dealer), then it would be important to determine which law applies, because both New Jersey and Missouri law do have a residency requirement that would have foreclosed A.M. Capen's from obtaining a remedy.[1]

Act 75 states in pertinent part:

> *(a) Dealer: person actually interested in a dealer's contract because of his having effectively in his charge in Puerto Rico the distribution, agency, concession or representation of a given merchandise or service;*
>
> *(b) Dealer's contract: relationship established between a dealer and a principal or grantor whereby and irrespectively of the manner in which the parties may call, characterize or execute such relationship, the former actually and effectively takes charge of the distribution of a merchandise, or of the rendering of*

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[1] "This act applies only:

(a) to a franchise (1) the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey, . . . " *New Jersey Permanent Statutes*, 56:10-4.

" . . . nor shall the term 'franchise' apply to a commercial relationship that does not contemplate the establishment or maintenance of a place of business within the state of Missouri. As used herein "place of business" means a fixed, geographical location at which goods, products or services are displayed or demonstrated for sale; *Missouri Revised Statutes*, section 407.400.

a service, by concession or franchise, on the market of Puerto Rico.

There are no cases in Puerto Rico that expressly interpret Act 75 as requiring residency in Puerto Rico or authorization to do business in the Commonwealth in order for a dealer to be covered by the act.

REASONS FOR GRANTING THE WRIT

I. The First Circuit's Opinion has departed from the accepted and usual course of judicial proceedings, attempting to usurp the role of the highest court of the Commonwealth of Puerto Rico by interpreting an important question of Puerto Rican law. In doing so, it ignored the application of the pertinent doctrines of Conflict of Laws. Finally, in deciding the substantive question, the First Circuit, unable to find a controlling precedent in applicable case law, engaged in an exercise of legal hair-splitting while attempting to fill purported gaps in the statute's language to create a new requirement of "physical presence" or of residence for statutory protection where there was none. This is, in effect, a case of a court legislating instead of interpreting the statute, and is clearly a departure from the accepted judicial roles.

A. The First Circuit erred in entertaining an important question of Puerto Rico law instead of certifiying it to the Puerto Rico Supreme Court.

The accepted and usual course of judicial proceedings require a federal court that is entertaining a matter

under 28 U.S.C. § 1332, diversity, to apply state law, 28 U.S.C. § 1652, according to applicable precedents, analogous decisions, considered dicta, etc. *Scotts African Union v. Conf. AUFCMP Church*, 98 F.3d 78 (3d Cir. 1996), citing *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 663 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980). The federal court must be circumspect in its determination since what it is doing is attempting to forecast what the highest court of the state is going to do when presented with a set of facts, *Railroad Commission of Tex. v. Pullman Co.*, 312 U.S. 496, 499-500 (1941).[2]

This is particularly important when there is no clear precedent to guide the federal court sitting in diversity. In the instant case the second panel of the First Circuit recognized that it must choose among diverse likely readings regarding the meaning of the pertinent parts of Act 75 as applied to the case at hand:

> Although the underscored text **does not explicitly "require [ ] a dealer to be a resident of Puerto Rico**, to be authorized to do business in the Commonwealth, or to have a place of business such as an official showroom or warehouse on the Island," as do the comparable statutes in New Jersey and Missouri, *A.M. Capen's*, 74 F.3d

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[2] "But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication."

> at 322, **it does strongly suggest** that the dealer must operate in Puerto Rico under similar requirements. The alternative, that the phrase could simply refer to a company with a contractual right to distribute in Puerto Rico, regardless of the locale of the bulk of its business, **is a less likely reading. . . . While we gain no additional insight from the definition of a dealer's contract,** the legislative history confirms **an interpretation of** "in Puerto Rico" that incorporates requirements that an Act 75 dealer be located in, be a resident of, or be authorized to do business in Puerto Rico. [Emphasis supplied] App. 9, 10.

In other words, the First Circuit admits that the plain text of the statute does not support a specific interpretation, but then engages in trying to move away from what the text says in order to find a more "likely reading." So the plain text is ignored and speculation is favored. This has been expressly disfavored by this Honorable Court:

> The decision of the Court of Appeals represents a premature and avoidable interference with the enforcement of state law in an area of special concern to the States. **Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when, as in the case here, the state courts stand willing to address questions of state law on certification from a federal court.** Wash. Rev. Code 2.60.900 (1983); Wash. Rule App. Proc. 16.16 Cf. Bellovi v. Baird, 428 U.S. 132, 150-151 (1976). In my view, the state courts should have been afforded an opportunity to construe the Washington moral nuisance law in the first instance. [Emphasis supplied] *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (Concurring opinion).

In Puerto Rico in Rule 53.1(f) of Puerto Rico's Rules of Civil Procedure it is expressly stated:

> A petition for certification is also perfected when the United States Supreme Court, any United States Circuit Court of Appeals, any Federal District Court or the State Court of any State of the Union requests, by filing the proper application with the clerk of the Supreme Court of Puerto Rico, a finding on local issues of law which are determinant to the cause of action brought before its consideration, **which issues have no clear precedents in the decisions of the Supreme Court of the Commonwealth of Puerto Rico.** [Emphasis added]

That the courts of Puerto Rico stand ready and willing to entertain such petitions has been made very clear by the Supreme Court of Puerto Rico, *Pan American Computer Corp. v. Data General Corp.*, 112 D.P.R. 780 (1982), Vol. 12, Puerto Rico Reports (Official translations of the Opinions of the Supreme Court of Puerto Rico) at page 983.

Similarly, the First Circuit recognized that there is much case law "carving out" the scope of Puerto Rico's Dealership Act, App. 3. And even if much of the case law is from the federal courts, it is the Supreme Court of Puerto Rico that has the last word on the interpretation of said statute. "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision . . . " *Railroad Commission of Tex. v. Pullman Co., supra,* pages 499-500. But the First Circuit in this case has effectively taken on the role of the

highest state courts in interpreting state statutes ("In order to honor the legislative intent of Act 75, the Puerto Rico and federal courts have taken steps to restrict the definition of who is a "dealer" within the broad framework of section 278(a)" App. 3). This is not correct. In matters of state law, the highest court of the state establishes the correct interpretation of the law, and that must be accepted by Federal Courts, *Hardware Mut. Cas. Co. v. Williams*, 332 F.Supp. 923, 925-26 (D.C. Ga., 1971). On the other hand, Federal Courts sitting in diversity *predict* what a State would decide if faced with the issue, *Nature Conservancy v. Machipongo Club, Inc.*, 579 F.2d 873, 875 (4th Cir. Va. 1978), *cert. denied*, 439 U.S. 1047. "And least appropiate of judicial forums in staking out new claims in the substantive law of torts is a Federal one, where constitutional considerations require national deference to State ascendancy in this area." *Dale System v. General Teleradio*, 105 F.Supp. 745, 752 (D.C.N.Y. 1952). "A breach of Law 75 is considered a 'tortious act' " *A.M. Capen's v. American Trading & Prod. Corp.*, 74 F.3d 317, 321 (1st Cir. 1996), citing *Telenetworks, Inc. v. Motorola Universal Data Sys., Inc.*, 906 F. Supp. 77 (D.P.R. 1995).

It is thus necessary to conclude that the First Circuit, in attempting to create new substantive requirements absent from the clear text of the statute, and therefore assuming a position of an equal to a State's highest court in a matter of state law, is clearly departing from the accepted and usual course of judicial proceedings. The usual course called for restraint and certification of the question to the Puerto Rico Supreme Court. This is so because, absent a clear *authoritative* and *controlling* precedent from the highest court of the State setting forth a

more restrictive interpretation of a statute, the court was bound to interpret it according to its plain language, if the wording is clear and unambiguous, article 14, *Puerto Rico Civil Code*, 31 L.P.R.A. § 14 (the First Circuit acknowledges this: "Although the underscored text does not explicitly "require[ ] a dealer to be a resident of Puerto Rico, to be authorized to do business in the Commonwealth, or to have a place of business such as an official showroom or warehouse on the Island" as do the comparable statutes in New Jersey and Missouri, . . . " App. 9. However, it concludes that A.M. Capen's does not operate "in Puerto Rico" because it " . . . has no employees, no office space or warehouse, and no assets in Puerto Rico."[3], thus, in effect adds these requirements to the, App. 12, and statute.

Although we are not claiming that the First Circuit interpretation of the requirements to be a "dealer" in Puerto Rico is unconstitutional, it does raise concern in terms of Article 1, § 8, clause 3 that states that the Congress shall have power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

It has been held that this clause is a limitation on the power of states to regulate commerce *Great Atlantic & Pac. Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 370-71 (1976). And even if Puerto Rico is not a State, "prohibitive effect of the commerce clause is binding on Puerto Rico through

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[3] As a matter of fact, A.M. Capen's had substantial assets in Puerto Rico in the form of a significant number of accounts receivables from businesses located within Puerto Rico.

territorial clause as an implied corollary of congressional commerce powers thereunder." *Sea-land Services, Inc. v. Municipality of San Juan*, 505 F. Supp. 533, 545 (D.C. Puerto Rico, 1980). Accordingly, the states cannot regulate in such a manner as to unduly discriminate againt interstate commerce. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). It is our position that A.M. Capen's complies with most of the requirements that have been established by statute and case law to be protected by Act 75, that, in effect, it had the exclusive distributorship of ATAPCO products and that the First Circuit decision is depriving A.M. Capen's of a right to have that business relationship protected. The creation of a physical presence requirement will thus put it at a disadvantaged position in relation to other Puerto Rican dealers, that perform the exact same functions, with the exeption of having some sort of "presence" in the island. Even though we acept that Act 75 serves a legitimate local purpose, such purpose can and has been accomplished without discriminating against interstate commerce. The First Circuit decision, if affirmed, will change this, and there has been no showing that that change in the statute's coverage cannot be promoted by alternative means that do not burden interstate commerce. The First Circuit did not address this issue and therefore its decision is thus open to a constitutional attack.

Therefore, by interpreting a state statute against its plain reading, the First Circuit is not only invading the prerogatives of state courts but endangering the constitutionality and therefore the validity of the same statute whose reach is being restricted. This is clearly not the accepted and usual course of judicial proceedings.

B. The First Circuit erred in declining to entertain the pertinent Conflict of Laws questions.

The First Circuit also departed from the accepted and usual course of judicial proceedings when it declined to entertain the Conflict of Laws doctrines. The second panel of the First Circuit concluded that the only matter before the Court was the applicability of Act 75. However, the Court would not have to even consider that issue if the law applicable to the contract among the parties had been that of New Jersey or Missouri. The issue is, in a sense, moot because petitioner maintains that Puerto Rico's laws and not those of Missouri or New Jersey are controlling; but, on the other hand, the court held that A.M. Capen's was not a dealer under Act 75. So, the end result is the same; what must, therefore, be addressed is whether the First Circuit correctly applied the Puerto Rico Dealer's Act to the facts of this case. Nevertheless, the issue of Conflict of Laws is pertinent to show the extent of abandonment of accepted and usual course of judicial proceedings by the First Circuit.

The First Panel that entertained this issue followed the correct procedure, stating "The first issue is what law applies. This necessitates an examination of the Conflict of Law principles governing contract and tort law." *A.M. Capen's v. American Trading & Prod. Corp.*, 74 F.3d 317, 319-20 (1st Cir. 1996) App. 20. After stating that the Puerto Rico Supreme Court had approved the "dominant or significant contacts" test for contract and tort actions, *A.M. Capen's v. American Trading & Prod. Corp.*, 74 F.3d 317, 320 (1st Cir. 1996) App. 20, it examined the case law, the Restatement (Second) of Conflict of Laws and the

pertinent statutes of Missouri and New Jersey, and affirmed:

> Taking policy issues first, courts have recognized that Law 75 "was passed to protect the interest of commercial distributors working in Puerto Rico" . . . App. 25.
>
> The Puerto Rico Dealer's Act has been described as embodying a "strong public policy." [Citation omitted], The case law establishes that Puerto Rico has a substantial interest in seeing that distributorships are not arbitrarily terminated or, if they are, that "due reparation" is provided to them. [Citation omitted] App. 25.
>
> As the district court pointed out, there is nothing in the statute that requires a dealer to be a resident of Puerto Rico to be authorized to do business in the Commonwealth, or to have a place of business such as an office, showroom or warehouse on the Island. Accordingly, Capen's appears to satisfy the definition of a dealer within the Dealer Act. App. 25, 26.
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> . . .
>
> Because all three jurisdictions evince a general policy of protecting distributors, we can fairly infer that the application of Puerto Rico law would not offend Missouri or New Jersey. By restricting protection to only those dealers who service customers within the state, Missouri and New Jersey are concerned with dealers who have established markets within their borders. Thus, it makes sense, in this case, to apply the law of the jurisdiction in which Capen's maintains its market. App. 27.

. . .

> In this case, we conclude that, bringing all the factors into consideration, the law of Puerto Rico most probably applies to this hybrid contract/tort action and, perforce, the district court properly made reference to the Puerto Rico Dealer's Act for the purpose of the motion to impose a provisional remedy. *A.M. Capen's v. American Trading & Prod. Corp.*, 74 F.3d 317, 321-323 (1st Cir. 1996) App. 27, 28.

The second panel ignored the extensive and well-reasoned opinion of the first panel and dismissed the Conflict of Law analysis with a footnote. It stated:

> Since we hold that Act 75 does not apply, and Puerto Rico law on this issue is identical to Missouri and New Jersey law – the other forums that might have an interest – there is no Conflict of Law. *See Steinke v. Sungard Fin. Sys., Inc.*, 121 F.3d 763, 775 (1st Cir. 1997) ("We need not resolve [the choice of law] issue, however, [if] 'the outcome is the same under the substantive law of either jurisdiction.' " (quoting *Lambert v. Kysar*, 983 F.2d 1110, 1114 (1st Cir. 1993). App. 6, 7.

The pertinent issue is whether either of the forums that might have an interest in the protection of the claimant provides a remedy. If the outcome is the same there is no Conflict of Law. However, in this case, the First Circuit chose to ignore what would have been the accepted and usual course of judicial proceedings, because it failed to see that Puerto Rico law was distinct from that of Missouri and New Jersey, and that it was effectively changing that law by restricting the definition of a dealer by adding a physical presence requirement. The First Circuit

was incorrect in concluding that the law on this issue was identical in all three jurisdictions. What really occurred was that the law on the issue of physical presence *was made identical*. As stated before, since the applicable remedies were different, the proper procedure was to determine which law applied and then apply the law to the facts. What the court did, however, was *to change existing law* by a restrictive interpretation, a role that properly belongs to the legislature or, assuming that the issue is really a matter of interpretation, to the Supreme Court of Puerto Rico.

A cursory analysis of pertinent statutes clearly supports this position. New Jersey expressly requires a "Dealer" or rather a "Franchisee" to " . . . establish or maintain a place of business within the State of New Jersey, . . . ," *New Jersey Permanent Statutes*, 56: 10-4 (*Application of act*). Place of business is defined as " . . . a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services. Place of business shall not mean an office, a warehouse, a place of storage, a residence or a vehicle.", *New Jersey Permanent Statutes*, 56: 10-3f (*Definitions – Place of business*).

Missouri statutes, likewise make clear that " . . . , nor shall the term 'franchise' apply to a commercial relationship that does not contemplate the establishment or maintenance of a place of business within the state of Missouri. As used herein 'place of business' means a fixed, geographical location at which goods, products or services are displayed or demonstrated for sale;" *Missouri Revised Statutes*, 407.400(1) (*Definitions – Franchise*).

Setting aside petitioner's doubts that the New Jersey and Missouri statutes pertain to the same type of distributorship relationship that Act 75 seeks to protect, and setting aside as well the differences between the definitions of "place of business" in the New Jersey and Missouri statutes and the requirement that the First Circuit has added to Act 75, both New Jersey and Missouri statutes clearly and unambiguously require the presence of a place of business in the State in order for the claimant to receive the statute's protection. This by itself makes those statutes different from Act 75 and, therefore, a Conflict of Law analysis was pertinent. This is so because, upon examining the plain text of the statutes and, absent a controlling Puerto Rico Supreme Court precedent establishing that Act 75 does require a "place of business in Puerto Rico," the remedies for persons who did not have such presence were different: no protection under Missouri or New Jersey law and protection under Puerto Rico law.

C. The First Circuit erred in adding a "physical presence requirement" to the application of Act 75 because the effect thereof is (a) to impermissibly discriminate against dealers that do not meet the added requirement, and (b) to extend the reach of the judiciary into terrain that is constitutionally preserved for the legislative branch of government, under the doctrine of separation of powers.

If the First Circuit interpretation of the Puerto Rico Dealer's Act remains in place it would have the effect of impermissibly discriminating between local and non-local dealers who share the same market, Puerto Rico, and otherwise meet the requirements set by the statute itself and by the Puerto Rico Supreme Court.

Article I, section 8, clause 3, of the Constitution commonly known as the "commerce clause" states that the Congress shall have power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Firstly, it has been held that this clause is a limitation on the power of states to regulate commerce, *see Great Atlantic & Pac. Tea Co., Inc. v. Cottrell,* 424 U.S. 366, 370-71 (1976). And even if Puerto Rico is not a State, the "prohibitive effect of the commerce clause is binding on Puerto Rico through the territorial clause as an implied corollary of congressional commerce powers thereunder." *Sea-land Services, Inc. v. Municipality of San Juan,* 505 F.Supp. 533, 545 (D.C. Puerto Rico, 1980). Accordingly, the states cannot regulate in such a manner as to unduly discriminate against interstate commerce. *Maine v. Taylor,* 477 U.S. 131,

138 (1986). "To implement the goals of curbing local protectionism and facilitating a national market, the courts have derived from the Commerce Clause limitations on the states' abilities to legislate in service of parochial interests. State regulations that discriminate against interstate commerce are subject to 'vitually *per se* rule of invalidity' *City of Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978). By 'discrimination' we mean 'differential treatment of in-state and out-of-state economic interest that benefits the former and burdens the latter'. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality,* 114 S.Ct. 1345, 1350 (1994)." *SSC Corp. v. Town of Smithtown,* 66 F.3d 502 (2d Cir. 1995).

Petitioner submits A.M. Capen's complies with most of the requirements that have been established by statute and case law in order to be protected by Act 75. That A.M. Capen's had the exclusive distributorship of ATAPCO products, and that the First Circuit decision is depriving A.M. Capen's of a right to have that business relationship protected. The creation of a physical presence requirement will thus put A.M. Capen's in a disadvantaged position in relation to other Puerto Rican dealers, which perform the exact same functions, with the exception of having some sort of "presence" in the island. Even though Act 75 serves a legitimate local purpose, such purpose can and has been accomplished without discriminating against interstate commerce. The First Circuit decision, if affirmed, will change this, and there has been no showing that changes in the statute's coverage cannot be promoted by alternative means that do not burden interstate commerce. (For a further discussion see App. 48-49). The First Circuit did not address this issue

and therefore its decision is thus open to a constitutional attack.

Therefore, by interpreting a state statute against its plain reading the First Circuit is not only invading the prerogatives of state courts but endangering the constitutionality and therefore the validity of the same statute whose reach is being restricted. This is clearly not the accepted and usual course of judicial proceedings.

Secondly, a Federal Court sitting in diversity is not free to impose its own view of what state law should be, but rather to apply state law as interpreted by the state's highest court. *McKenna v. Pacific Rail Services*, 32 F.3d 820, 825 (3d Cir. 1994). Puerto Rican case law recognizes a separation among the branches of government that must not be diminished by the courts:

> The above does not justify that we judges encroach upon a power that the Constitution has placed in another branch of government in order to correct a situation that is considered undesirable. The wish to satisfy the people's calls for reform does not authorize us to transgress the limit imposed upon us by the same document that gives us our authority. The Constitution is the most solemn expression of the will of the people and to its precepts we all owe absolute loyalty, **even when said loyalty forces us to abstain from formulating a rule or standard that we consider adequate or even indispensable.** See: P. Kurland, *Mr. Justice Frankfurter and the Supreme Court*, Univ. of Chicago Press (1971). As Judge Brennan has stated:
>
> > The Court is not council of Platonic guardians for deciding our most difficult and

> emotional questions according to the Justice's own notions of what is just, wise or politic. To the extent that this is a governmental function at all, it is the function of the people's elected representatives. W. Brennan, *Inside View of the High Court*, New York Time Magazine, Oct. 6, 1963, p. 35.

In re Rodriguez Torres, 106 D.P.R. 698, 710-11, 6 Official Translation of the Opinions of the Supreme Court of Puerto Rico 974, 986 (1978) [Emphasis supplied].

On such occasions where the Puerto Rico Supreme Court has deemed necessary to render decisions which affect existing legislation, it has been done to protect constitutional rights; see, for example, *Figueroa Ferrer v. E.L.A.*, 107 D.P.R. 250, 277-78, 7 Official Translation of the Opinions of the Supreme Court of Puerto Rico 278, 303-04 (1978). No such constitutional analysis was undertaken by the First Circuit to attempt to explain its encroachment of the legislative function. Therefore, the First Circuit was not free to add requirements to Act 75, even if it considered it "wise" to do so. By so doing, the First Circuit violated the separation of powers' doctrine and clearly departed from the accepted and usual course of judicial proceedings.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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A.M. Capen's Co., Inc.

United States Court of Appeals
For the First Circuit

No. 98-2236

A.M. CAPEN'S CO., INC.,
Plaintiff, Appellee,

v.

AMERICAN TRADING AND PRODUCTION CORPORATION, BLAS ROSSY-ASENCIO AND RAFAELA FULANA DE TAL,
Defendants, Appellants.

No. 98-2237

A.M. CAPEN'S CO., INC.,
Plaintiff, Appellant,

v.

AMERICAN TRADING AND PRODUCTION CORPORATION, BLAS ROSSY-ASENCIO AND RAFAELA FULANA DE TAL,
Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Daniel R. Dominguez, *U.S. District Judge*]

Before

Torruella, *Chief Judge*,

Wallace,* *Senior Circuit Judge*,
and Lynch, *Circuit Judge*.

José Enrique Colón-Santana for appellants American Trading and Production Corporation, Blas Rossy-Asencio, Rafaela González-Ruiz, and their conjugal partnership.

Fernando L. Galuardo, with whom *Woods & Woods* and *Philip E. Roberts* were on brief, for appellee A.M. Capen's Co., Inc.

February 8, 2000

TORRUELLA, *Chief Judge*. For the second time, this Court is asked to determine whether the Puerto Rico Dealers' Act of 1964, 10 L.P.R.A. §§ 278a-d (1994) ("Act 75"), applies to the circumstances of this case. On appeal from entry of a preliminary injunction, a prior panel of this Court reached an initial determination that the claims of plaintiff-appellee, A.M. Capen's Co., Inc., against defendant-appellant, American Trading & Production Corp. ("ATAPCO"), were likely to be resolved in Capen's favor under the laws of Puerto Rico, specifically Act 75. *See generally A.M. Capen's Co. v. American Trading & Prod. Corp.*, 74 F.3d 317 (1st Cir. 1996). However, on appeal from judgment below for Capen's, this Court must again consider whether Capen's is a dealer under Act 75. For the reasons further discussed in this opinion, we reverse the decision of the district court.

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* Of the Ninth Circuit, sitting by designation.

As we observed in our recent opinion, *Triangle Trading Co. v. Robroy Industries, Inc.*, No. 98-2366, slip op. at 2 (1st Cir. Dec. 29, 1999), there is much case law carving out the scope of Puerto Rico's dealership act. In order to honor the legislative intent of Act 75, the Puerto Rico and federal courts have taken steps to restrict the definition of who is a "dealer" within the broad framework of section 278(a). *See id.* at 7-9. We now take one more step down that path and hold that under the facts of this case, appellee fails to qualify for the remedies of the statute because it did not operate as a "dealer" in Puerto Rico.

I.

The undisputed facts underlying this action are as follows. Capen's, a New Jersey corporation with its principal place of business in that state, entered into an agreement with ATAPCO's predecessor to be the exclusive distributor of Globe-Weiss and Steelmaster office products in Puerto Rico, along with thirty-seven other countries in the Caribbean and Central and South America. The arrangement continued after ATAPCO, whose principal place of business is Missouri, took over. However, the parties never signed a formal contract because they could not agree on choice-of-law and forum-selection clauses.

The negotiations took place in Missouri and New Jersey. Pursuant to the agreement, ATAPCO's products were shipped to Capen's in New Jersey. Capen's would generally take orders from its Puerto Rican customers in New Jersey via telephone or fax, although an agent would actually travel to Puerto Rico two to three times a

year for that purpose. Capen's would then ship the products directly to its customers in Puerto Rico and send bills from New Jersey to Puerto Rico. Capen's did not advertise in Puerto Rico, nor did it maintain a warehouse, showroom, inventory, employees, office, address, or telephone number in Puerto Rico. Likewise, Capen's is not qualified to do business in Puerto Rico. *See A.M. Capen's Co. v. American Trading & Prod. Corp.*, 973 F. Supp. 247, 253-55 (D.P.R. 1997).

In December 1993, ATAPCO terminated the exclusive aspect of the dealership, and it authorized Blas Rossy-Asencio as a sales representative for Puerto Rico effective January 1994.[1] The trial court entered a preliminary injunction in favor of Capen's on June 16, 1995, which this Court affirmed. *See A.M. Capen's*, 74 F.3d at 319. In July 1997, the district court resolved Capen's pending cross-motion for partial summary judgment on liability. First, the court observed that ATAPCO had failed to provide additional evidence on Capen's dealership status within the established time frame;[2] consequently, the court concluded that there was no reason to reconsider its

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[1] Capen's filed a separate tort action against Rossy-Asencio, which was consolidated with this case.

[2] The Local Rules of the U.S. District Court for the District of Puerto Rico require that " '[t]he papers opposing a motion for summary judgment shall include a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, properly supported by specific reference to the record.' " *A.M. Capen's*, 973 F. Supp. at 256 (quoting Local Rule 311.12). Because ATAPCO did not comply with Local Rule 311.12, the district court admitted Capen's statement of uncontested facts. *See id.* at 252.

original finding, based on the same record and affirmed by the court of appeals, that Act 75 covered Capen's dealership. *See A.M. Capen's*, 973 F. Supp. at 257-58. Then, based on the material facts it deemed admitted, the court found Act 75 liability against ATAPCO as a matter of law. *See id.* at 260. Damages were set after a bench trial, by opinion and order entered on March 31, 1998.[3] *See A.M. Capen's Co. v. American Trading & Prod. Corp.*, 12 F. Supp.2d 222, 224-30 (D.P.R. 1998).

II.

Summary judgment is only appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). We normally review the district court's summary judgment *de novo*, "viewing 'the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor.' " *Euromotion, Inc. v. BMW of N. Am., Inc.*, 136 F.3d 866, 869 (1st Cir. 1998) (*quoting Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990)); *see also Morris v. Government Dev. Bank*, 27 F.3d 746, 748 (1st Cir. 1994). However, in this case, the district court properly admitted the uncontested facts submitted by the plaintiff-appellant when ATAPCO failed to comply with the local rules and oppose the motion in the appropriate form.[4] *See*

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[3] Because we reverse on the finding of liability under Act 75, we need not reach the issue related to the damages award.

[4] We review case management decisions for abuse of discretion. *See Rosario-Diaz v. Gonzalez*, 140 F.3d 312, 315 (1st Cir. 1998). Where a district court has established a local rule, such as

A.M. Capen's, 973 F. Supp. at 256 (*citing Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 930-31 (1st Cir. 1983)). Because we limit our review to "the record as it stood before the district court at the time of its ruling," *J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1250 (1st Cir. 1996) (*citing Voutour v. Vitale*, 761 F.2d 812, 817 (1st Cir. 1985)), there are no facts in dispute.[5]

Consequently, the only matter before the Court is the applicability of Act 75,[6] a matter we previously

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the "anti-ferreting" rule adopted by the district court in Puerto Rico, requiring the movant to supply the court with a list of uncontested facts and the nonmovant to reply with a counter list of genuine facts in dispute, both supported by specific citations to the record, "a party's failure to comply, would, where appropriate, be grounds for judgment against that party." *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 931-32 (1st Cir. 1983). Accordingly, we find no error in the district court's refusal to extend ATAPCO more time to submit evidence in opposition to summary judgment on Act 75 liability.

[5] On appeal, ATAPCO challenges the statistical evidence submitted to represent Capen's sales of ATAPCO's products in Puerto Rico. ATAPCO relies solely on evidence presented in the damages trial. However, as we already discussed above, the district court's decision not to reconsider the matter after judgment had been entered was not an abuse of discretion. ATAPCO's argument that we should on our own initiative take up evidence introduced at the damages trial is unavailing. We will not consider new evidence now. *See Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 96 n.6 (1st Cir. 1996) (citing *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 253 (1st Cir. 1996)); *J. Geils Band*, 76 F.3d at 1250.

[6] Capen's also appealed the district court's choice of law determination. Since we hold that Act 75 does not apply, and Puerto Rico law on this issue is identical to Missouri and New

considered and provisionally affirmed. ATAPCO argues that we are not bound by our earlier decision which was rendered as a preliminary opinion for the purposes of reviewing an injunction. In this case, because the record was fully developed before the first panel, there is a tension between the limited binding authority of a decision regarding a preliminary injunction and the law of the case doctrine. *See Cohen v. Brown University*, 101 F.3d 155, 167 (1st Cir. 1996) (citing 1B James W. Moore et al., *Moore's Federal Practice* ¶ 0.404[1] (2d ed. 1993)), *cert. denied*, 520 U.S. 1186 (1997); *see also Ackerley Communications of Mass., Inc. v. City of Cambridge*, 135 F.3d 210, 213-15 (1st Cir. 1998) (implying that legal opinion was law of case in preliminary injunction setting where facts were undisputed). However, the law of the case doctrine only directs our discretion; it does not limit our power. *See Arizona v. California*, 460 U.S. 605, 618 (1983); *see also Cochran v. M & M Transp. Co.*, 110 F.2d 519, 521-22 (1st Cir. 1940) (*quoting Messinger v. Anderson*, 225 U.S. 436, 444 (1912)). Two traditional considerations weigh in favor of reopening our initial determination. First, as we acknowledged in our prior opinion, " 'conclusions as to the merits of the issues presented on preliminary injunction are to be understood as statements of probable outcomes,' rather than as comprising the law of the case." 74 F.3d at 322 (quoting *Narragansett Indian Tribe v. Guilbert*, 934 F.2d

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Jersey law – the other forums that might have an interest – there is no conflict of law. *See Steinke v. Sungard Fin. Sys., Inc.*, 121 F.3d 763, 775 (1st Cir. 1997) ("We need not resolve [the choice of law] issue, however, [if] 'the outcome is the same under the substantive law of either jurisdiction.' ") (quoting *Lambert v. Kysar*, 983 F.2d 1110, 1114 (1st Cir. 1993)).

4, 6 (1st Cir. 1991)). Thus, it is implicit that "a party losing the battle on likelihood of success may nonetheless win the war at a succeeding trial on the merits." *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 238 (1st Cir. 1986). Second, we review an award of a preliminary injunction only for abuse of discretion. *See A.M. Capen's*, 74 F.3d at 319. Therefore, the scope of review given a case that comes to us in the posture of a preliminary injunction is more deferential than that given to one which comes to us on appeal from final judgment. *See, e.g., Rodriguez-Burgos v. Electric Energy Auth.*, 853 F.2d 31, 37 (1st Cir. 1988) (considering case upholding a permanent injunction); *Goyco de Maldonado v. Rivera*, 849 F.2d 683, 686 (1st Cir. 1988) (distinguishing case heard on appeal from issuance of interim injunction); *Rosario Nevarez v. Torres Gaztambide*, 820 F.2d 525, 527 (1st Cir. 1987) (noting that review is limited to plaintiff's likelihood of success, and not a "clear-cut ruling," on the merits).

III.

Thus, we turn to Capen's status as a dealer under Act 75. In departing from the legal determination of our colleagues in this circuit, we take into account that the initial decision was not intended to be binding, and that the court did not fully contemplate the meaning of dealer under the Act, but rather considered the Act only in the context of Puerto Rico's interest in the action. *See A.M. Capen's*, 74 F.3d at 321-22.

In a statutory construction case, we begin with the language of the statute, and only if the language is ambiguous or leads to an unreasonable interpretation do

we turn to the legislative history and other aids. The words that are not defined within the statute are given their ordinary meaning, with all due consideration to the context. *See Brady v. Credit Recovery Co.*, 160 F.3d 64, 66 (1st Cir. 1998); *Grunbeck v. Dime Sav. Bank*, 74 F.3d 331, 336 (1st Cir. 1996); *Riva v. Massachusetts*, 61 F.3d 1003, 1007 (1st Cir. 1995).

Act 75 defines a dealer as: "a person actually interested in a dealer's contract because of his having effectively in his charge *in Puerto Rico* the distribution, agency, concession or representation of a given merchandise or service." 10 L.P.R.A. § 278(a) (emphasis added). Although the underscored text does not explicitly "require[ ] a dealer to be a resident of Puerto Rico, to be authorized to do business in the Commonwealth, or to have a place of business such as an official showroom or warehouse on the Island," as do the comparable statutes in New Jersey and Missouri, *A.M. Capen's*, 74 F.3d at 322, it does strongly suggest that the dealer must operate in Puerto Rico under similar requirements. The alternative, that the phrase could simply refer to a company with a contractual right to distribute in Puerto Rico, regardless of the locale of the bulk of its business, is a less likely reading. First, under such circumstances, Puerto Rico would have little or no interest in providing the dealer with an additional remedy for the breach of contract, and second, Puerto Rico would face significant legal and practical problems regulating conduct outside its borders.

While we gain no additional insight from the definition of a dealer's contract,[7] the legislative history confirms an interpretation of "in Puerto Rico" that incorporates requirements that an Act 75 dealer be located in, be a resident of, or be authorized to do business in Puerto Rico.[8] The statement of legislative purpose for Law 75 reads:

> "The Commonwealth of Puerto Rico cannot remain indifferent to the growing number of cases in which domestic and foreign enterprises, without just cause, eliminate their dealers . . . as soon as these have created a favorable market and without taking into account their legitimate concerns.
>
> The Legislative Assembly of Puerto Rico declares that the reasonable stability in the *dealer's relationship in Puerto Rico* is vital to the

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[7] The Act defines dealer's contract as a "relationship established between a dealer and a principal or grantor whereby . . . the former actually and effectively takes charge of the distribution of a merchandise, or of the rendering of a service, by concession or franchise, on the market of Puerto Rico." 10 L.P.R.A. § 278(b).

[8] The Supreme Court of Puerto Rico has recognized the insufficiency of the statutory definition of dealer and has found it necessary to examine the legislative history of Act 75. *Mario R. Franceschini, Inc. v. Riley Co.*, 591 F. Supp. 414, 415-16 (D.P.R. 1984) (commenting that the Supreme Court of Puerto Rico found the definition to be "sketchy") (*citing San Juan Mercantile Corp. v. Canadian Transp. Co.*, 108 D.P.R. 134, 8 P.R. Offic. Trans. 218 (1978)); *Roberco, Inc. & Roberto Colon v. Oxford Indus., Inc.*, 122 D.P.R. 115, 121-22, 22 Offic. Trans. 107, 114-15 (1988) (observing that Act 75 defines dealer in "broad and imprecise terms").

> general economy of the country, to the public interest and to the general welfare. . . . "

Roberco, 122 D.P.R. at 121-22, 22 Offic. Trans. at 113-14 (emphasis added) (quoting 18-3 *Diario de Sesiones* 1531 (1954)). In addition, "the Industry and Commerce Committee submitted a report recommending the bill's approval as a means to tackle the problem of termination of a dealer's contract without just cause, in prejudice to the local dealer, who 'has created a favorable market for the products, and . . . has effectively assumed his responsibilities.' " *Id.* (quoting 18-3 *Diario de Sesiones* 1531).

The legislative history clearly focuses on the problems faced by dealers in Puerto Rico who are terminated once they have invested in and created a favorable market for a principal's product. *See Draft-Line Corp. v. Hon Co.*, 781 F. Supp. 841, 843-44 (D.P.R. 1991), *aff'd*, 983 F.2d 1046 (1st Cir. 1993); *see also Franceschini*, 591 F. Supp. at 415 ("The scant legislative history of the statute refers solely to the problems faced by dealers in Puerto Rico who created a favorable market. . . . "); *Roberco*, 122 D.P.R. at 121-22, 22 Offic. Trans. at 113-14 (discussing legislative intent to protect local dealers). The courts that have interpreted the statute and its legislative history uniformly conclude that the statute was enacted to prevent "economic exploitation of local dealers." *A.M. Capen's*, 74 F.3d at 321 (quoting *Draft-Line*, 781 F. Supp. at 844); *see also Roberco*, 122 D.P.R. at 121, 22 Offic. Trans. at 113 ("Act 75 was created to avoid the harm resulting from the practice of some manufacturers who arbitrarily break with local dealers"); *J. Soler Motors, Inc. v. Kaiser Jeep Int'l Corp.*, 108 D.P.R. 134, 8 P.R. Offic. Trans. 138, 143, 1978 (Act 75 "has

the purpose of protecting the Puerto Rican intermediaries"). Because there is no evidence to the contrary, we similarly ascertain that the legislature sought to protect the interests of commercial distributors working in Puerto Rico. *See A.M. Capen's*, 74 F.3d at 321 (citing *Ballester Hermanos, Inc. v. Campbell Soup Co.*, 797 F. Supp. 103, 106 (D.P.R. 1992)).

Based on the facts before us, we cannot conclude that Capen's operates "in Puerto Rico" for purposes of Act 75. Capen's presence in Puerto Rico is almost nonexistent; Puerto Rico is merely one of the destination markets for the ATAPCO goods that it distributes. Capen's has no employees, no office space or warehouses, and no assets in Puerto Rico. Other than the two or three times a year that an agent visits Puerto Rico to take orders directly, all other contact and orders are made through New Jersey, where Capen's maintains a place of business and is incorporated.

CONCLUSION

After careful consideration and review, based on the parties' limited connection to Puerto Rico, we conclude that Act 75 should not apply to this case. We therefore **reverse** and **remand** for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-2236

A.M. CAPEN'S CO., INC.,
Plaintiff-Appellee,

v.

AMERICAN TRADING AND PRODUCTION CORPORATION, BLAS ROSSY-ASENCIO AND RAFAEL FULANA DEL TAL,
Defendants-Appellants.

No. 98-2237

A.M. CAPEN'S CO., INC.,
Plaintiff-Appellant,

v.

AMERICAN TRADING AND PRODUCTION CORPORATION, BLAS ROSSY-ASENCIO AND RAFAELA FULANA DEL TAL,
Defendants-Appellees.

JUDGMENT

Entered: February 8, 2000

These causes came on to be heard on appeals from the United States District Court for the District of Puerto Rico, and were argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is reversed and the cause

remanded to the district court for further proceedings consistent with the opinion issued this date.

By The Court

Clerk.

[cc: Messrs. Colon-Santana and Gallardo]

United States Court of Appeals

For the First Circuit

No. 95-1870

A.M. CAPEN'S CO., INC.,

Plaintiff, Appellee,

v.

AMERICAN TRADING AND PRODUCTION CORPORATION AND BLAS ROSSY ASENCIO AND HIS CONJUGAL PARTNERSHIP,

Defendants, Appellants.

APPEAL FROM THE
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Daniel R. Dominguez, *U.S. District Judge*]

Before

Selya, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and Stahl, *Circuit Judge*.

José Enrique Colon Santana for appellant.
Philip E. Roberts for appellee.

January 18, 1996

BOWNES, ***Senior Circuit Judge.*** This is an appeal from a preliminary injunction issued by the district court barring defendant-appellant American Trading and Production Corp. ("ATAPCO") from terminating plaintiff-appellee A.M. Capen's Co., Inc. ("Capen's") as an exclusive distributor for Puerto Rico of ATAPCO's products. Capen's had filed an action in the United States District Court for the District of Puerto Rico alleging that ATAPCO violated P.R. Laws Ann. tit. 10, § 278, *et seq.* (1976 and Supp. 1989) (a.k.a. Law 75, the Puerto Rico Dealer's Act) by terminating the exclusivity of the distributorship. Section 278a of title 10 provides:

> Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly perform any act detrimental to the established relationship or refuse to renew said contract on its normal expiration, except for just cause.

The injunction was issued pursuant to the provisional remedy provision, Section 278b.1 of the Act, which provides:

> In any litigation in which there is directly or indirectly involved the termination of a dealer's contract or any act in prejudice of the relation established between the principal or grantor and the dealer, the Court may grant, during the time the litigation is pending solution, any provisional remedy or measure of an interdictory nature to do or to desist from doing, ordering any of the parties, or both, to continue, in all its terms, the relation established by the dealer's contract, and/or to abstain from performing any

> act or any omission in prejudice thereof. In any case in which the provisional remedy herein provided is requested, the Court shall consider the interests of all parties concerned and the purposes of the public policy contained in this chapter.

There is no dispute as to the basic facts. In 1978, Capen's entered into an agreement with ATAPCO's predecessor, Sheller-Globe, to be the exclusive distributor of Globe-Weiss and Steelmaster office products in Puerto Rico, the Caribbean, the Dominican Republic, and Central and South America. The agreement did not contain an expiration date. Although confirmed in a written letter, the parties did not sign a formal contract because they could not agree on the law that would apply to the contract. When ATAPCO took over, the arrangement with Capen's continued, as did the disagreement as to choice-of-law and forum selection clauses.

ATAPCO, with its principal place of business in Missouri, wanted Missouri law to apply to the contract. Capen's, a New Jersey corporation with its principal place of business in that state, wanted Puerto Rico law to apply. As a result, ATAPCO and Capen's never signed a formal contract. In December 1993, ATAPCO wrote a letter to Capen's in which it terminated the exclusive aspect of the dealership. ATAPCO did not end the Capen's dealership; it reserved the right to sell to others. ATAPCO made Blas Rossy Asencio a sales representative

for the area for which Capen's originally had the exclusive rights. This lawsuit ensued.[1]

Proceedings of the District Court

The district court adopted the recommendation of the Magistrate Judge that the provisional remedy in the Puerto Rico Dealer's Act be granted. The court then issued a full-blown opinion giving the reasons for its action. It found that Capen's "has exhibited a likelihood of success on the merits." *A.M. Capens Co., Inc. v. American Trading and Prod. Corp.*, 892 F. Supp. 36, 38 (D.P.R. 1995). It then held:

> Capens [sic] has also shown that his business will suffer irreparable injury if the injunction is not granted because Mr. Rossy Asencio will continue to sell the products in the areas wherein Capens had the exclusivity with the added competitive advantage for Asencio of freight charges assumed by ATAPCO. The above will obviously mean that Capens' business market will be significantly irreparably diminished.
>
> The harm that Capens will suffer most certainly outweighs ATAPCO's possible harm: the business area will remain unchanged (the Caribbean and Central and South America) and ATAPCO will continue receiving benefits, either through Mr. Rossy Asencio or through A.M. Capens; however, the harm is for Capens who will lose business market should Mr. Rossy

---

[1] Capen's has sued Blas Rossy Asencio for tortious inference with contractual relations.

> Asencio continue to interfere with the customers.

Id. at 38-39. Finally, the court held that the public interest would not be adversely affected by the preliminary injunction. *Id.* at 39.

It is obvious that what we are reviewing is not only a provisional remedy under the Puerto Rico Dealer's Act, but a preliminary injunction that meets, at least *prima facie*, all federal requisites. The appropriate standard for reviewing a preliminary injunction is abuse of discretion. *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 239 (1st Cir. 1986) (en banc), *cert. denied*, 481 U.S. 1014 (1987).

Analysis

We start our analysis with the only finding of the district court to which defendant has objected – probability of success on the merits. Defendant's appeal is posited on two contentions: that Puerto Rico law does not apply; and that plaintiff is not a dealer under the Puerto Rico Dealer's statute. As the district court noted, this is "a close matter." *Id.*

That is because Capen's does not fit the mold of a typical Puerto Rican dealer. It does not advertise in Puerto Rico and has neither a warehouse nor a showroom on the Island. It sells exclusively to retailers and wholesalers. Though Capen's sometimes sends an agent to Puerto Rico, it does not have a resident agent on the Island and is not qualified to do business in Puerto Rico on a regular basis. On the other hand, the annual sales made by Capen's in Puerto Rico under its exclusive distributorship increased from about $30,000 in 1978 to

$423,000 in 1993. Total Puerto Rico sales of ATAPCO products for the five-year period spanning from 1989 to 1993 came to about $1,976,000.

The first issue is what law applies. This necessitates an examination of the conflict of law principles governing contract and tort law.

Contract Factors

ATAPCO contends that the district court incorrectly applied Puerto Rico choice of law rules to the facts. It stresses that *none* of the acts – negotiation of the contract, performance of the contract obligations, or breach of the contract – took place in Puerto Rico. It points out that neither it nor Capen's has offices or employees located in Puerto Rico.

The Supreme Court of Puerto Rico has approved the "dominant or significant contacts" test for contract and tort actions. *In re San Juan Dupont Plaza Hotel Fire Litig.*, 745 F. Supp. 79, 82 (D.P.R. 1990). Thus, "the laws of the jurisdiction with the most significant contacts with respect to the disputed issue should apply." *Id.* In determining this question, recourse to the Restatement (Second) of Conflict of Laws is appropriate. *Id.* (citing Sections 6 and 188).

Under Section 188 of the Restatement, absent a contractual choice of law, the contacts to be taken into account in a contract action include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

Restatement (Second) of Conflict of Laws § 188 (1971).

The places of contracting and negotiating the contract in question occurred in the continental United States. ATAPCO and Capen's met in St. Louis, Missouri, to discuss the contract; they also spoke by phone. However, "[s]tanding alone, the place of contracting is a relatively insignificant contact." *Id.* § 188 cmt. e.

The performance of the contract takes place, in part, in the continental United States. When Capen's wishes to purchase products from ATAPCO, it places an order with ATAPCO's customer service offices in Pennsylvania or Missouri. The goods are then sent to Capen's in New Jersey or to the point of embarkation. Sometimes Capen's sends a trailer to the Pennsylvania office to pick up the merchandise. But performance also occurs in Puerto Rico – where the market is – because the contract granted Capen's the exclusive right to sell ATAPCO's products there. *See id.* § 188 cmt. c ("[A] state where a contract provides that a given business practice is to be pursued has an obvious interest in the application of its rule designed to regulate or to deter that business practice.").

The location of the subject matter of the contract similarly varies, depending on one's view. If the *products* sold by ATAPCO, and then by Capen's, are considered

the subject matter, they start out in Pennsylvania or Missouri (and Kentucky according to ATAPCO) and end up in New Jersey. Arguably, this is the end of the line because when the goods are shipped to Puerto Rico, they become the subject of contracts between Capen's and its customers in Puerto Rico. ATAPCO, not surprisingly, takes this position, pointing out that it has no direct contacts in Puerto Rico.

The other subject matter of the contract is the status of Capen's as the exclusive distributor of ATAPCO's merchandise. This, it seems clear, is located in Puerto Rico. It is this subject matter which is in dispute, rather than, say, the price of the goods or the manner of their delivery to Capen's. The essential purpose of the exclusive distributorship was to enable Capen's to sell the products it purchased from ATAPCO in Puerto Rico without competition.

The last factor – the location of the parties – does not point to Puerto Rico. ATAPCO, a Missouri corporation, has main offices in Pennsylvania and Missouri and also apparently conducts business in Maryland and Kentucky. Capen's is a New Jersey corporation with its place of business there. Capen's does not have any offices, warehouses or permanent employees in Puerto Rico; it does not have a Puerto Rico address or phone number. Capen's does, however, regularly send employees to Puerto Rico to take orders from customers.

Tort Factors

A breach of Law 75 is considered a "tortious act." *Telenetworks, Inc. v. Motorola Universal Data Sys., Inc.*, ___

F. Supp. ___, ___ 1995 WL 707412, at 2 (D.P.R. Nov. 28, 1995). Section 278b of the Dealer's Act provides: "[i]f no just cause exists for the termination . . . the principal shall have executed a tortious act against the dealer and shall indemnify it."

The Restatement of Conflict of Laws provides that in a tort action the law of the state with the most significant relationship to "the occurrence and the parties" controls. Restatement (Second) of Conflict of Laws § 145 (1971). The following contacts should be taken into consideration:

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

Id.

The injury occurred in Puerto Rico because that is where the exclusive Capen's dealership was terminated. The termination directly impacts the position Capen's held in the Puerto Rico market. *See Colletti v. Ovaltine Food Products*, 274 F. Supp. 719, 722 (D.P.R. 1967) (where an Illinois corporation terminated the distributorship of a Puerto Rican dealer, its failure to "place the goods in Puerto Rico at the disposal of the . . . dealer" is a tortious act which "did not take place anywhere but in Puerto Rico"). Additionally, because Law 75 is aimed at compensating victims for wrongful terminations, Puerto Rico, the

site of the injury, has a greater interest in applying its laws. *See* Restatement § 145 cmt. c; Coletti, 274 F. Supp. at 722 ("[R]egardless of the manner in which the defendant . . . allegedly notified the plaintiff" of the termination of its distributorship, the defendant executed the tortious act within Puerto Rico.). Viewing all of the relevant factors as a whole, we find they cut in favor of applying Puerto Rico law.

General Considerations

Section 6 of the Restatement (Second) of Conflict of Laws sets forth general choice of law principles. Where there is no statute on point, the following factors should be considered:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6 (1971).

Taking the policy issues first, courts have recognized that Law 75 "was passed to protect the interests of commercial distributors working in Puerto Rico." *Ballester Hermanos, Inc. v. Campbell Soup Co.*, 797 F. Supp. 103, 106 (D.P.R. 1992). Law 75 is " 'directed to level the contractual conditions between two groups financially unequal in their strength.' " *Draft-Line Corp. v. Hon Co.*, 781 F. Supp. 841, 844 (D.P.R. 1991) (quoting *Walborg Corp v. Tribunal Superior*, 140 D.P.R. 184, 189 (1975)), *aff'd*, 983 F.2d 1046 (1st Cir. 1993).

> The Dealer's Act was enacted by the Puerto Rico Legislature to prevent the economic exploitation of local dealers. The Legislature had observed that dealers in Puerto Rico were particularly vulnerable to summary termination once they had established a favorable market for a principal's products.

Id. at 843-44.

The Puerto Rico Dealer's Act has been described as embodying a "strong public policy." *Medina & Medina v. Country Pride Foods, Ltd.*, 858 F.2d 817, 820 (1st Cir. 1988) (response of Puerto Rico Supreme Court to a certified question concerning Law 75). The case law establishes that Puerto Rico has a substantial interest in seeing that distributorships are not arbitrarily terminated or, if they are, that "due reparation" is provided to them. *Bonn v. Puerto Rico Int'l Airlines, Inc.*, 518 F.2d 89, 91 (1st Cir. 1975).

As the district court pointed out, there is nothing in the statute that requires a dealer to be a resident of Puerto Rico, to be authorized to do business in the Commonwealth, or to have a place of business such as an

office, showroom or warehouse on the Island. Section 278 of the Act defines "Dealer" and "Dealer's Contract":

> (a) Dealer: person actually interested in a dealer's contract because of his having effectively in his charge in Puerto Rico the distribution, agency, concession or representation of a given merchandise or service;
>
> (b) Dealer's contract: relationship established between a dealer and a principal or grantor whereby and irrespectively of the manner in which the parties may call, characterize or execute such relationship, the former actually and effectively takes charge of the distribution of a merchandise, or of the rendering of a service, by concession or franchise, on the market of Puerto Rico.

P.R. Laws Ann. tit. 10, § 278 (1976 and Supp. 1989). Accordingly, Capen's appears to satisfy the definition of dealer within the Dealer's Act.

Although both Missouri and New Jersey have statutes protecting dealers, we do not think that either state has an interest in protecting Capen's in the instant circumstances. Missouri provides that a franchisor must give ninety days' notice to a franchisee of a termination of a franchise agreement and that, in the absence of such notice, a franchisee may recover damages. Mo. Rev. Stat. §§ 407.405, 407.410 (1974 and Supp. 1975). The law, however, only applies to distributors with a place of business in Missouri. Mo. Rev. Stat. § 407.400(1) (1974 and Supp. 1975) (definition of "franchise"). It is plain that Capen's has no franchise presence in Missouri.

New Jersey has a Franchise Practices Act which provides that notice (60 days) must be given prior to the termination of a franchise agreement and that such a termination only can be based on "good cause." N.J. Rev. Stat. § 56:10-5 (1971). As in Missouri, the Act applies only to a franchisee who establishes a "place of business" in New Jersey. *Id.* § 56:10-4. Thus, even though Capen's is located in New Jersey, it does not qualify for the Act's protection.

Because all three jurisdictions evince a general policy of protecting distributors, we can fairly infer that the application of Puerto Rico law would not offend Missouri or New Jersey. By restricting protection to only those dealers who service customers within the state, Missouri and New Jersey are concerned with dealers who have established markets within their borders. Thus, it makes sense, in this case, to apply the law of the jurisdiction in which Capen's maintains its market.

In this context, ATAPCO argues that under P.R. Laws Ann. tit. 13, § 2403 (1989), Capen's is not required to file informational documents (certificate of incorporation, statement of assets and liabilities) with the Puerto Rico Department of State to qualify as doing business in Puerto Rico. Section 2403 exempts from filing those corporations which only receive, outside Puerto Rico, orders by mail or otherwise and fill the orders by shipping the goods into Puerto Rico from the outside. ATAPCO argues that because Section 2403 exempts Capen's from having to qualify to do business in Puerto Rico, Puerto Rico can have no interest in protecting the status of Capen's as a distributor. ATAPCO presents no cases in support of this

contention and, as already noted, there is nothing in the Dealer's Act giving rise to such a requirement.

This is an appeal from a grant of preliminary injunctive relief. When an appeal comes to us in that posture, the appellate court's "conclusions as to the merits of the issues presented on preliminary injunction are to be understood as statements of probable outcomes," rather than as comprising the ultimate law of the case. *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991); *accord Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d at 238. In this case, we conclude that, bringing all the factors into consideration, the law of Puerto Rico most probably applies to this hybrid contract/tort action and, perforce, the district court properly made reference to the Puerto Rico Dealer's Act for the purpose of the motion to impose a provisional remedy.

Because ATAPCO has neither briefed nor argued the other factors that the district court considered in issuing the preliminary injunction, we need not consider them. We must note, however, after reviewing the record carefully, that we agree with the district court's findings: that Capen's would suffer irreparable harm unless a preliminary injunction issued; that no appreciable harm would be incurred by ATAPCO by reason of such relief; and that the public interest would not be adversely affected by a preliminary injunction.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-2236

A.M. CAPEN'S CO., INC.,
Plaintiff-Appellee,

v.

AMERICAN TRADING AND PRODUCTION CORPORATION, BLAS ROSSY-ASENCIO AND RAFAELA FULANA DEL TAL,
Defendants-Appellants.

No. 98-2237

AM.M CAPEN'S CO., INC.,
Plaintiff-Appellant,

v.

AMERICAN TRADING AND PRODUCTION CORPORATION, BLAS ROSSY ASENCIO AND RAFAELA FULANA DEL TAL,
Defendants-Appellees.

BEFORE

TORRUELLA, Chief Judge,
WALLACE,*, Senior Circuit Judge,
SELYA, BOUDIN, STAHL, LYNCH and
LIPEZ Circuit Judges.

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* Of the Ninth Circuit, sitting by designation.

[cc: Messrs. Colon-Santana and Gallardo]

ORDER OF COURT

Entered: March 16, 2000

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Phoebe D. Morse, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-2236

A.M. CAPEN'S CO., INC
Plaintiff, Appellee
v.
AMERICAN TRADING AND PRODUCTION CORPORATION, BLAS ROSSEY-ASENCIO AND RAFAELA FULANA DE TAL,
Defendants, Appellants

No. 98-2237

A.M. CAPEN'S CO., INC
Plaintiff-Appellant
v.
AMERICAN TRADING AND PRODUCTION CORPORATION, BLAS ROSSY-ASENCIO AND RAFAELA FULANA DE TAL,
Defendants, Appellees

PETITION FOR REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-2236

A.M. CAPEN'S CO., INC
Plaintiff, Appellee

v.

AMERICAN TRADING AND PRODUCTION CORPORATION, BLAS ROSSEY-ASENCIO AND RAFAELA FULANA DE TAL,
Defendants-Appellants

No. 98-2237

A.M. CAPEN'S CO., INC
Plaintiff-Appellant

v.

AMERICAN TRADING AND PRODUCTION CORPORATION, BLAS ROSSY-ASENCIO AND RAFAELA FULANA DE TAL,
Defendants, Appellees

COUNSEL'S STATEMENT

I express a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to the prior decision of this same court entered on January 18, 1996, A.M. Capen's Co. v. American Trading & Prod. Corp., 74 F 3d 317 (1st Cir 1996), within this same litigation and consideration by the full court is necessary to secure and maintain uniformity of decisions of this court.

In San Juan, Puerto Rico, this 28th day of February, 2000

Woods & Woods

By: /s/ L Gallardo
Fernando L. Gallardo
USCA 1st Cir. # 15418

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PETITION FOR REHEARING EN BANC

TO THE HONORABLE COURT:

COMES NOW A.M. Capen's Co., Inc. through its undersigned attorneys and respectfully states and prays as follows:

Conflicting Decisions

On February 8, 2000 a panel of this Court decided that Puerto Rico's Act 75 of 1964, 10 L.P.R.A. § 278 et seq. ("Law 75"), should not apply to this case and reversed the judgment entered by the District Court of Puerto Rico that ordered the defendants, appellants, cross appellees, American Trading and Products Corp. ("ATAPCO") and Blas Rossy Asencio, to pay damages to plaintiff, appellee, cross appellant A.M. Capen's Co. Inc., ("Capen's"). The district court concluded that ATAPCO violated Law 75 because it impaired the existing relationship when it designated a separate representative, Blas Rossy Asencio, to sell ATAPCO's products in Puerto Rico while Capen's was and had been the exclusive distributor of ATAPCO in Puerto Rico for more than 15 years. Capen's 2 conflicts

with a prior decision of another panel of this same Court that concluded that Act 75 should apply to this case. **A.M. Capen's Co. v. American Trading & Prod. Corp.**, 74 F 3d 317 (1st Cir 1996) ("Capen's 1), which is completely the opposite, on an appeal from a preliminary injunction issued within this litigation. Based on Capen's 1, and the application of Law 75 to this case, the District Court of Puerto Rico, also decided that Law 75 applied to this case and issued the afore mentioned judgment for the plaintiff, appellee, Capen's. A copy of both decisions are attached as Exhibits 1 and 2.

Although both conflicting decisions were entered within the same litigation, consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

In agreement, in part

Both decisions identified the same provisions of Act 75 as applicable to this case, as follows:

Section 278a of title 10:

> "Notwithstanding the existence in a dealer's contract of a clause reserving the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly ***perform any act detrimental to the established relationship*** or refuse to renew said contract on its normal expiration, except for just cause (Emphasis added)

Section 278 of the Act defines "Dealer" and "Dealer's Contract":

> (a) Dealer: person actually interested in a dealer's contract because of his having effectively in his charge in Puerto Rico the distribution of a given merchandise or service;
>
> (b) Dealer's contract: relationship established between a dealer and a principal or grantor whereby and irrespectively of the manner in which the parties may call, characterize or execute such relationship, the former actually and effectively takes charge of the distribution of a merchandise or service, by concession or franchise, **on the market of Puerto Rico**. (Emphasis added).
>
> P.R. Laws Ann., tit. 10 § 278 (1976 and Supp. 1989).

No disputed facts

There is no dispute in Capen's 1 and 2 as to the basic facts, which were summarized by the District Court, in **A.M. Capen's v. American Trading and Products**, 973 F Supp 247 (D.P.R. 1997), as follows (References to dockets and exhibits are excluded):

On June 6, 1978, John F. Cornforth, General Sales and Marketing Manager for Globe-Weis (A division of Sheller-Globe Corp.), sent a letter to Camilo Fernández, president of A.M. Capen's Co., stating that "[c]onfirming my phone conversation with you [Fernández] today, effective immediately you will become our exclusive representative for the sales of our standard Globe-Weis products to Puerto Rico, the Caribbean area, Dominican Republic and Central and South America." The letter also contained various terms of agreement, such as prices, commissions, and shipping procedures.

The relationship between Globe-Weis and A.M. Capen's Co. continued over the next fifteen years; although the Globe-Weis division was purchased by ATAPCO from Sheller-Globe Corporation in 1987, A.M. Capen's distribution of Globe-Weis and Steelmaster products continued as before. Indeed, an ATAPCO officer, Mr. Dan Hirshhorn, sent A.M. Capen's a letter dated January 7, 1992, stating that it was ATAPCO's intention to take measures to "strengthen this relationship" and "protect the exclusivity of your [A.M. Capen's'] [sic] territory." There is also evidence that A.M. Capen's annual sales of ATAPCO products were substantial; for example, such sales exceeded $1,000,000.00 for two consecutive years (1992 - 1993).

In July, 1992, Mr. Hirshhorn was replaced by Mr. Michael McNamara as Director of International Markets. A year and a half later, on December 14, 1993, Mr. McNamara wrote Mr. Fernandez to inform him that A.M. Capen's' [sic] exclusivity was being withdrawn. The letter, in pertinent part, states that:

> While we feel very good about what your organization has been able to accomplish over the years in these markets [Caribbean and Central America], we also are convinced that the way we have structured our business relationship has served as a restriction to growth and a self-imposed limit to access of important markets. Your business is valuable to us and we want our good relationship to continue. At the same time, it is necessary to change our non-contractual arrangement for exclusive market access. Effective January 1, 1994, the Caribbean and Central

American Territories will become non-exclusive territories for A.M. Capens.

The Court notes that neither this letter nor, indeed, any other item in evidence, indicates that ATAPCO considered A.M. Capen's to have failed to hold up its end of the bargain. The battle of the labels began then, with Mr. McNamara referring to A.M. Capen's as a "U.S. based Exporter" and "a top-notch consolidator of branded products," and to the agreement between ATAPCO and A.M. Capen' 5 [sic] as a "Non-contractual arrangement." A flurry of letter-writing ensued, with A.M. Capen's protesting at its deprivation of exclusivity and requesting negotiations, and ATAPCO insisting that the loss of exclusivity would not be damaging to A.M. Capen's. Some attempts were made to settle the dispute, but the parties failed to reach an agreement.

A.M. Capen's then filed the instant diversity suit against ATAPCO under Act No. 75, seeking compensation for the losses it incurred as a result of ATAPCO's unilateral action. Civil No. 94-1367 (DRD). When it was later discovered that ATAPCO had named Mr. Blas Rossy-Asencio as its direct sales representative in Puerto Rico, A.M. Capen's filed a second suit, this one against Mr. Rossy-Asencio under Puerto Rico's tort statute, for tortious interference with contract Civil No. 94-1483 (DRD). The two cases were later consolidated.

A.M. Capen's Co. is incorporated and has its principal place of business in New Jersey. ATAPCO is incorporated in Maryland. There is some dispute as to whether ATAPCO's principal place of business is also in Maryland, or whether it is instead in Missouri, Either way,

there is complete diversity between the parties. 28 U.S.C.A. § 1332 (a) (1993).

Neither company maintains any sort of physical presence in Puerto Rico. As Mr. Camilo Fernandez testified at the preliminary injunction hearing held on July 6, 1994, before U.S. Magistrate Judge Jesus A. Castellanos, he does travel to Puerto Rico two or three times a year to meet with clients, but most orders he receives from Puerto Rico clients are placed by telephone or fax to his offices in New Jersey. [End of district court's factual summary]

Therefore, had ATAPCO provided evidence that A.M. Capen's sales of ATAPCO products outside of Puerto Rico were substantially greater than its sales in Puerto Rico, the Court would have had the opportunity to re-evaluate its earlier answer to the question whether Act No. 75 should be held to apply to the dispute between the parties.

It must be noted that Capen's does not sell within the continental United States but in Puerto Rico and 37 other countries outside of the US and 44% of all Capen's' [sic] sales of ATAPCO products were done in Puerto Rico. Puerto Rico was likely Capen's most important market for ATAPCO products. More importantly, Capen's developed the market for ATAPCO products in Puerto Rico from $20,000 per year in 1978 to $453,000 in 1993, which is the year that ATAPCO appointed Blas Rossy Asencio as representative and impaired the relationship with Capen's.

Capen's 1 and Capen's 2 agree that Act 75 does not require a dealer to be resident of Puerto Rico, to be

authorized to do business in the Commonwealth, or to have a place of business such as an official showroom or warehouse on the Island. (Capen's 1 at page 12; Capen's 2 at page 10).

Different conclusions

The conclusion of Capen's 1 was the following:

"In this case we conclude that, **bringing all the factors into consideration**, the law of Puerto Rico most probably applies to this hybrid contract/tort action and, perforce, the district court properly made reference to the Puerto Rico Dealer's Act for the purpose of the motion to impose a provisional remedy." (emphasis ours).

The conclusion in Capen's 2 is:

"Although the underscored text does not explicitly 'require[] a dealer to be a resident of Puerto Rico, to be authorized to do business in the Commonwealth, or to have a place of business such as an official showroom or warehouse on the Island', as do the comparable statutes in New Jersey and Missouri, A.M. Capen's, 74 F 3d at 322, (Exhibit 2, page 10) it does "**strongly suggest** that the dealer must operate in Puerto Rico under similar requirements". (Emphasis ours).

So, we are faced by two different conclusions that result from distinctive processes. In Capen's 1 the process was one that analyzed all applicable factors, which seems to be more scientific, but in Capen's 2 we are faced only with a statutory construction or an opinion not based on factors but on something else that is not very clear in the opinion such as "" [sic] it does strongly suggest" and "is

a less likely reading". The former seems more reliable for a decision that will most probably be a landmark in Puerto Rico's Act 75 litigation.

ANALYSIS

Capen's 1

In Capen's 1 the Court's analysis was focused first on the **Contract Factors** and concentrated on the "dominant or significant contacts" test that the Supreme Court of Puerto Rico used in **In Re San Juan Dupont Hotel Fire Litigation**, 745 F Supp. 79, 82 (D.P.R. 1990). The Court said "the laws of the jurisdiction with the most significant contacts with respect to the disputed issue should apply", Id. Then the Court referred to various contacts to be taken into account in a contract action and applied the detailed facts of this case to those factors and made several conclusions such as:

1. In this case the place of contracting was relatively insignificant.

2. Performance of the contract occurred in Puerto Rico, where the market is – because the contract granted Capen's the exclusive right to sell ATAPCO products there.

3. The subject matter that is in dispute is the exclusive distributorship and "this, it seems clear, is located in Puerto Rico. The exclusive purpose of the exclusive distributorship was to enable Capen's to sell the products it purchased from ATAPCO in Puerto Rico without competition."

4. The location of the parties did not point to Puerto Rico. Both entitles had offices in locations other than Puerto Rico. Capen's "does, however, regularly send employees to Puerto Rico to take orders from customers"

The Court in Capen's 1 then applied the **Tort Factors** to its analysis and concluded that "the injury occurred in Puerto Rico because that is where the exclusive Capen's dealership was terminated. the termination directly impacts the position Capen's held in the Puerto Rico Market." It continued to state that "Additinally, because Law 75 is aimed at compensating victims for wrongful terminations, Puerto Rico, the site of the injury, has a great interest in applying its laws"

The third factor used by the Capen's 1 Court was identified as **General Considerations** and in that section indicated that:

a. Taking the policy issues first, courts have recognized that Law 75 'was passed to protect the interests of commercial distributors working in Puerto Rico" citing **Ballester Hermanos, Inc. v. Campbell Soup Co.**, 797 F Supp 103, 106 (D.P.R. 1992);

b. "as the district court pointed out, there is nothing in the statute that requires a dealer to be a resident of Puerto Rico, to be authorized to do business in the Commonwealth, or to have a place of business such as office, showroom or warehouse on the Island";

c. "although both Missouri and New Jersey have statutes protecting dealers, we do not think that either state has an interest in protecting Capen's in the instant circumstances" and "because all three jurisdictions evince

a general policy of protecting distributors, we can fairly infer that the application of Puerto Rico law would not offend Missouri or New Jersey. By restricting protection to only those dealers who service customers within the state, Missouri and New Jersey are concerned with dealers who have established markets within their borders. Thus it makes sense, in this case, to apply the law of the jurisdiction in which Capen's maintains its market";

d. There is nothing in the Dealer's Act giving rise to the requirement that a dealer must file reports with the Department of State of Puerto Rico to qualify to do business therein.

In essence, Capen's 1 did not base its decision on mere statutory construction but on a detailed analysis of specific factors that were present in the case and concluded that Act 75 should apply to this case. That process should be given considerable and significant weight.

Capen's 2

Contrary to Capen's 1, the Court in Capen's 2 initiated its decision indicating that a prior panel reached an initial determination that Capen's claims were "likely" to be resolved in Capen's favor under the laws of Puerto Rico. However, what Capen's 1 concluded was more than that, it was that "bringing all the factors into consideration, the law of Puerto Rico "most probably" applies to this hybrid contract/tort action". "Likely" and "most probably" are not synonymous.

Capen's 1 decision goes on to indicate that the Puerto Rico and federal courts have taken to restrict the definition of who is a dealer within the broad framework of section 278(a). However, there is no issue in this case that (a) since June 6, 1978 Capen's was designated the exclusive distributor of ATAPCO products for Puerto Rico (the letter says: ***"[c]onfirming my phone conversation with you today, effective immediately you will become our exclusive representative for the sales of our standard Globe-Weis products to Puerto Rico, the Caribbean area, Dominican Republic and Central and South America."*** (Underlining ours); (b) that Capen's is today the only distributor of ATAPCO products in Puerto Rico; (c) that Blas Rossy Asencio was not appointed distributor (purchases, sells and makes a profit) but representative (does not purchase, sells and collects commissions) of ATAPCO products for Puerto Rico; (d) that for more than 20 years only Capen's purchased ATAPCO products and sold them in Puerto Rico (e) inasmuch the relationship between Capen's and ATAPCO has always been one of debtor/creditor there should be no doubt that Capen's is a traditional distributor. Whether that relationship is protected by Act 75 is the issue and not if the definition of "dealer" is at stake. In its relationship with ATAPCO, Capen's is nothing else but a distributor of ATAPCO products.

The correct issue is whether Law 75 applies to the distributor relationship of the parties

Contrary to Capen's 2's assessment, the real issue of this case is not whether Capen's is a distributor under the definition of Act 75, but whether Act 75 applies to the

distributorship relationship that exists between the parties since 1978. In essence, whether the law of Missouri, New Jersey or Puerto Rico must be applied to resolve the legal problem that resulted when ATAPCO appointed Blas Rossy Asencio in 1993 as a sales representative after Capen's had been the sole entity that for 15 years purchased from ATAPCO and sold ATAPCO products in Puerto Rico and has a letter agreement that indicates that Capen's was the exclusive distributor for Puerto Rico, is Puerto Rico, New Jersey or Missouri. Specific factors dealing with that issue were analyzed by Capen's 1 and decided that Puerto Rico law applied. Capen's 2 took another route that did not consider any of the objective factors followed by Capen's 1 and made a conclusion only on a subjective construction of the statute.

Future legislative action may be necessary, provided [sic] is constitutional

Capen's 2 concentrated in certain areas of Law 75 that may necessitate future legislative action and not in what is presently required by Act 75. More than once, and emphasized at the conclusion of the opinion, Capen's 2 stated that Capen's has no warehouse, showroom, inventory, address, offices, employees in Puerto Rico and is not qualified to do business here. If those are going to be requirements for Law 75 protection, let the Puerto Rico Legislature enact them, provided that they are constitutional, but, in the meantime, let us not deprive of Law 75 protection a traditional dealer only because it elected to distribute in Puerto Rico without incurring in those expenses.

Facts and factors were the same in Capen's 1 and 2

We do not question the Court's power to reach a conclusion in an appeal after a final judgment different from another one after an injunction entered within the same litigation. However, in this case, the factual situation that was presented during the first and second appeals were exactly the same. The defendant did not present any additional facts to refute those that were considered in first instance. For example, some of the most pertinent and relevant facts that remained unaltered and not refuted are: (a) 44% of all Capen's sales of ATAPCO products were done in Puerto Rico, (b) Capen's expanded and created the market of ATAPCO products in Puerto Rico increasing sales from $20,000 per year in 1978 to over $453,000 in 1993, (c) Capen's agents and/or employees visited Puerto Rico several times a year to advertise and conduct sales of ATAPCO products, (d) Capen's was designed in writing as the exclusive distributor of ATAPCO's predecessors' products to Puerto Rico and (e) in 1992 ATAPCO wanted to strengthen that relationship and protect Capen's exclusivity.

The Court in Capen's 2 should have addressed the points or factors that were covered in Capen's 1. None of those factors were refuted, discarded or set aside by Capen's 2. Inasmuch as all the pertinent and material facts, and the factors used for the analysis in Capen's 1 remained intact and unchanged in Capen's 2, then it is reasonable to concluded [sic] that a very solid, strong and convincing argument or basis had to be utilized by Capen's 2 to reach a completely different result. A major or paramount argument is missing in Capen's 2.

Nothing in Law 75 requires what Capen's 2 concluded

Capen's 2 turned to Capen's status as a dealer under Act 75 at page 9 of the decision and indicated that the new panel in departing from the legal determination of the colleagues in this circuit took into account that the initial decision was not intended to be binding, and that the court did not fully contemplate the meaning of dealer under the Act, but rather considered the Act only in the context of Puerto Rico's interest in the action. However, in the analysis of Capen's 1, at the General Considerations section, that was included after the Contract and Tort Factors were discussed and analyzed, the first panel specifically addressed the provisions of Law 75 that define "Dealer" and "Dealer's Contract" and indicated:

"As the district court pointed out, there is nothing in the statute that requires a dealer to be a resident of Puerto Rico, to be authorized to do business in the Commonwealth, or to have a place of business such as an office, showroom, or warehouse on the Island. Section 278 of the Act defines "Dealer" and "Dealer's Contract":

> (a) Dealer; person actually interested in a dealer's contract because of his having effectively in his charge in Puerto Rico the distribution of a given merchandise or service;
>
> (b) Dealer's contract: relationship established between a dealer and a principal or grantor whereby and irrespectively of the manner in which the parties may call, characterize or execute such relationship, the former actually and effectively takes charge of the distribution of a merchandise or service, by concession or franchise, on the market of Puerto Rico

P.R. Laws Ann., tit. 10 § 278 (1976 and Supp. 1989). Accordingly, Capen's appears to satisfy the definition of a dealer within the Dealer's Act.

The only reasonable conclusion is that Capen's 2 is not correct in stating that the court (in Capen's 1) "did not fully contemplate the meaning of dealer under the Act, but rather considered the Act only in the context of Puerto Rico's interest in the action. See A.M. Capen's, 75 F 3d at 321-22." because Capen's 1 delved into the definitions of Act 75 and made a complemented, objective and informed decision.

"In Puerto Rico"

The Court in Capen's 2 then went, page 9, into an analysis as if this was only a statutory construction case and initiated that process with a general mention of a few cases dealing with construction of statutes but immediately leaped to the definition of dealer according to Law 75 and underlined the phrase "in Puerto Rico" that appears in the definitions of Act 75, section 278(a). Absent other reasoning or fundament [sic], but recognizing and distinguishing that Act 75 does not require that a dealer be a resident of Puerto Rico, or have a place of business, showroom or warehouse in Puerto Rico to be a distributor protected by Law 75, the Court concluded that the above quoted language, that is the phrase "in Puerto Rico", "strongly suggest" that the dealer must be a resident of Puerto Rico, or have a place of business such as an official showroom or warehouse on the Island to be covered by Law 75.

The Court in Capen's 2 goes even further and indicates, page 10 of the decision, that concluding the contrary, that is that a dealer in those circumstances is covered by Law 75 as Capen's 1 decided, is "a less likely reading" of the statute.

So, the only apparent basis for the Court in Capen's 2's conclusion that Law 75 should not apply to this case is simply the unsupported opinion that when the definition of dealer says "in Puerto Rico", it means that they have to be residents of Puerto Rico, or have offices, showrooms or warehouses on the Island. That should not be sustained.

No discrimination-equal protection-unfair advantage

At page 10 of Capen's 2, the Court indicated that under such circumstances, Puerto Rico would have little or no interest in providing the dealer with an additional remedy for the breach of contract and that Puerto Rico would face significant legal and practical problems regulating conduct outside its borders. That is not the case. All remains within the borders of Puerto Rico. All that Puerto Rico must do is apply its laws indiscriminately to protect the party that developed the market in Puerto Rico. A local Puerto Rican distributor could not have an unfair advantage over others, non local, that do the same.

The dealer that is protected by Law 75 is the one that created and developed the market

It is a very reasonable legal conclusion that the essence of Act 75 is to protect the dealers that create a favorable market in Puerto Rico for principals. If the dealer person or dealer entity that developed the market

in Puerto Rico for a principal in the United States or elsewhere, is a non resident of Puerto Rico, or a corporation from California, Florida, New Jersey or from any other country, Law 75 must protect him or it from having his or its business taken away without just cause, just as if that dealer is a person that resides in Puerto Rico, or is authorized to do business in Puerto Rico, or has an office, showroom, employees or inventory in Puerto Rico. The law is tailored for the party that developed the market and assumed the responsibilities, be him or it from Puerto Rico or anywhere else. Any other interpretation will have negative constitutional repercussions. It does not seem legal that Puerto Rico could concede protection against unjust terminations to resident Puerto Rican dealers or others authorized to do business in Puerto Rico but not to those dealers that do not meet that criteria only because they are from another jurisdiction and elect not to have offices, showrooms or warehouses in Puerto Rico. The situation gets worst [sic] when those local and non local dealers do the same work, that is, selling in Puerto Rico and developing the Puerto Rico market for a principal.

According to the Court in Capen's 2, page 10, no additional insight can be gained from the definition of "Dealer's contract" in Law 75. However, contrary to the Court's rejection of that source, that definition, which was used by Capen's 1, should assist in this process because its last part states " . . . ***the former (the dealer) actually and effectively takes charge of the distribution of a merchandise or service, by concession or franchise, on the market of Puerto Rico"***, (Parenthesis and underlining added) which is, precisely, the market that Capen's

has been in charge for more than 20 years and where Capen's sold 44% of all the ATAPCO products it bought from ATAPCO.

The legislative history supports the protection of the dealer that created the market

The sections of the legislative history quoted by the Court in Capen's 2, at page 11 of the decision, are significant but only if considered from a different perspective, which supports the above mentioned argument. The main point that appears from the legislative history is that the protection of Law 75 is to that person who creates the favorable market of a principal's product in Puerto Rico. It is reasonable to conclude that in this case the person or entity that "has created a favorable market for the products, and . . . has effectively assumed his responsibilities" and the one that is going to benefit from the protection of Act 75, is the plaintiff, appellee, cross appellant Capen's.

Presence in Puerto Rico

As the district court of Puerto Rico said in **Ballester Hermanos, Inc. v. Campbell Soup, Inc.**, 797 F. Supp. 103, 106 in the year 1992, "Because there is no evidence to the contrary, we similarly ascertain that the legislature sought to protect the interests of commercial distributors ***'working in Puerto Rico'*** " (Emphasis ours). It is clear that the court did not say, "Puerto Rican commercial distributors", or "foreign entities authorized to do business in Puerto Rico", or "with offices, showrooms, inventory or employees in Puerto Rico", or "local dealers". The law does not say that and does not require it. All it says is

"working in Puerto Rico"; so, inasmuch as (a) Capen's sold into Puerto Rico millions of dollars of ATAPCO products to retailers and wholesalers that are located inside Puerto Rico, (b) Capen's sent an agent several times per year to Puerto Rico to conduct sales, all phone calls, E-Mails, faxes, letters, price listings and other correspondence that Capen's sends to its customers in Puerto Rico actually end in Puerto Rico, and (c) more important, Puerto Rico purchasers of ATAPCO products from Capen's generate a significant amount of Accounts Receivables (which is a Capen's asset), it is reasonable to conclude that Capen's has "presence in Puerto Rico" and has been "working in Puerto Rico" for Act 75 purposes since 1978.

However, at page 12 of the Capen's 2 decision, the Court said that Capen's presence in Puerto Rico is almost nonexistent. In view of the foregoing, that appears to be incorrect.

Waiver

ATAPCO recognized that Puerto Rico is Capen's "territory". In a 1992 letter an ATAPCO officer informed Capen's that is was ATAPCO's intention to take measures to "strengthen this relationship" and "protect the exclusivity of your territory". The district court indicated "The court therefore finds that ATAPCO has waived any affirmative defense it may have to the courts exercise of personal jurisdiction". **A.M. Capen's v. American Trading**, 973 F. Supp. 247 (D.P.R. 1997).

WHEREFORE, A.M. Capen's respectfully requests that this Petition for Reheàring En Banc be granted and

that the decision in Capen's 2 be reversed and another one entered concluding that Law 75 applies to this case, and the case remanded to the panel for further proceedings.

I CERTIFY that a copy of this petition for Rehearing En Banc, in paper and in diskette form, was sent by regular mail on this same date to José Enrique Colón Santana, Esq., Avenida César González 513, Hato Rey, Puerto Rico 00918.

In San Juan, Puerto Rico, this 28th day of February, 2000.

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